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No. 15-606

IN THE

# Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

*Petitioner,*

*v.*

STATE OF COLORADO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

## BRIEF FOR AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE

*Amici* are law professors who specialize in evidence and criminal law and procedure.[1] As legal academics, *amici* have an interest in the consistent and correct application of the rules of evidence, and in reconciling those rules with the constitutional right to a fair trial.

The brief is joined by the following professors:

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel or party authored this brief in whole or part. Duke University School of Law supports faculty research and scholarship, and that financial support contributed to the costs of preparing this brief. Otherwise, no person or entity apart from the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Duke University is not a signatory to the brief, and the views expressed here are solely those of the *amici*. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office. Counsel of record received timely notice of the intent to file the brief.

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## SUMMARY OF ARGUMENT

The petition raises the question whether the rules prohibiting juror impeachment should give way to constitutional concerns when a jury member comes forward with evidence of racially or ethnically biased statements made during deliberations about a criminal defendant's guilt. The question is an important one that has deeply divided both federal and state courts. See Pet. App. 23a n.4 (Marquez, J., dissenting).

Applying this Court's previous decisions on the scope of Rule 606(b) will not resolve the split in authority going forward. In two previous cases, the Court has not found fair trial concerns significant enough to override Rule 606(b), but it has left open the question at issue here. Both the substance and the structure of the juror statements made in this case distinguish it from this Court's earlier decisions. *Tanner v. United States*, 483 U.S. 107, 127 (1987), concerned juror competency rather than juror prejudice. In *Warger v. Shauers*, 135 S. Ct. 521 (2014), the Court addressed a juror's partiality in a matter "internal" to deliberations and ordinarily covered by Rule 606(b), but that case did not involve bigotry specifically directed at a criminal defendant. Moreover, the *Warger* decision noted that "[t]here may be cases of juror bias so extreme" that the no-impeachment rule could give way. 135 S. Ct. at 529 n.3. This Court should now recognize that explicit racial or ethnic prejudice against a criminal defendant falls into this category, resolving the existing conflict. The balance of interests is markedly different in such cases than in *Tanner* or *Warger*.

First, the fundamental unfairness of a guilty verdict tainted by racial prejudice raises particularly

acute constitutional concerns. In this case, the right to a fair criminal trial, its essential component of an impartial jury, and the grave threat to impartiality that racial or ethnic bias poses all converge. See *Wright v. United States*, 559 F Supp. 1139, 1151 (E.D.N.Y. 1983) ("If a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."). Indeed, racial or ethnic prejudice against a defendant abridges the fair trial right almost "by definition." *Warger*, 135 S. Ct. at 529 n.3.

Second, juror testimony is likely to be the only available evidence to establish such prejudice. The "usual safeguards" this Court has pointed to in prior cases are not "sufficient to protect the integrity of the process" in cases of racial or ethnic bias. *Id.* Moreover, the administrability concerns that arise with general claims of juror dishonesty or partiality are not present in the narrower and clearer context of expressly racist considerations. The impairment in *Tanner* was also of a type that could be exposed through means other than reliance on juror testimony Intoxication may be observable during the trial and is a potential subject of testimony by non-jurors. Similarly, the kind of bias at issue in *Warger*—a juror's "views about negligence liability for car crashes" that resulted from a prior accident involving her daughter, *id.* at 529—is more likely to be discernable from external evidence or revealed during voir dire than racial or ethnic prejudice against a defendant.

Third, the experience of jurisdictions that have admitted juror testimony on the limited question of racial or ethnic bias suggests that consistently recognizing the exception will not unduly infringe on juror privacy or meaningfully burden the courts. The

concern about bigotry has some self-limiting mechanisms. Courts have continued to apply the no-impeachment rule unless statements are overtly racist, objectively verifiable, and focused on a criminal defendant's guilt or innocence. Furthermore, pursuant to Rule 606(b), courts already consider juror testimony on "extraneous prejudicial information" such as media accounts and "outside influences" such as threats and bribes. Although the statements of ethnic animus at issue in this case occurred "during the jury's deliberations" within the meaning of the rule, an additional constitutional exception can be administered just as the enumerated exceptions are. The initial factual question is an objective one: whether a racist comment pertaining to the case was uttered. In addition, with regard to a juror's racial or ethnic prejudice against a defendant, courts need not inquire into the statement's effect on internal mental processes in order to address the issue of a remedy.

Finally, the policy justifications for Rule 606(b) are not served by applying it in this context. Permitting verdicts tainted by racial or ethnic bias to remain in place in the interest of "finality" does profound harm to the criminal justice system. Moreover, public confidence in the "integrity" of adjudication declines when racial or ethnic prejudice comes to light but evidentiary rules bar its consideration. A criminal defendant's right to assert that the jury deliberations were racially tainted currently depends on the jurisdiction in which the case arises. Leaving potentially unconstitutional verdicts entirely "beyond effective reach" in some jurisdictions will only promote "irregularity and injustice." Fed. R. Evid. 606(b), Advisory Committee Note to subdivision (b). This Court has long recognized that there must be a measure of flexibility

in the no-impeachment rule because cases might arise in which its rigid application violates "the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 269 (1915); see also *Warger*, 135 S. Ct. at 529 n.3. The alleged prejudice at issue here presents such a case.

## ARGUMENT

### I. THE PARAMOUNT CONSTITUTIONAL CONCERN WITH RACIAL OR ETHNIC DISCRIMINATION AGAINST CRIMINAL DEFENDANTS SHOULD OVERRIDE THE EVIDENTIARY BAR TO IMPEACHMENT BY JUROR TESTIMONY.

This case arises at the intersection of the Sixth Amendment fair trial guarantee and the difficult and lasting problem of racial prejudice among jurors. Racial or ethnic bias is an "especially pernicious" form of prejudice in the criminal justice process to which this Court applies special scrutiny. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); see also *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (a defendant has "a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice"); *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (noting the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system").

The Court has been vigilant, for example, about state-sponsored prejudice when prosecutors exercise peremptory challenges of jurors for racially discriminatory reasons. See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); see also *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) ("When the government's choice

of jurors is tainted with racial bias," then "the very integrity of the courts is jeopardized."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee.") (internal citation omitted).

The Court should be no less vigilant when allegations arise that overt racial or ethnic prejudice has tainted a jury's guilty verdict. *Cf. McCollum*, 505 U.S. at 62 (Thomas, J., concurring) (cautioning against "exalting the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"). Indeed, "the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007).

In this case involving sexual assault and harassment, a seated juror argued during deliberations that "Mexican men take whatever they want," Pet. App. 4a., that "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," *id.*, that "Mexican men [are] physically controlling of women because they have a sense of entitlement," *id.*, and that the juror's experience in law enforcement suggested that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*

The focused prejudice here represents a much more substantial defect in the proceedings than the

bias at issue in the *Warger* case. When partiality comes in the form of racial or ethnic prejudice, it "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." Wright & Gold § 6074, at 513. Racial animus, moreover, raises particularly significant constitutional issues in criminal cases, which is a context that *Warger* did not present. See *Rose*, 443 U.S. at 563.

Federal Rule of Evidence 606(b), though otherwise applicable to the statements of jurors during deliberations, should yield to these constitutional concerns when it shields racially motivated factfinders. As this Court has previously stated, "no right ranks higher than the right of the accused to a fair trial," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and "the inestimable privilege of trial by jury" underlies "the whole administration of criminal justice." *Holland*, 493 U.S. at 511 (Stevens, J., dissenting). The guarantee of an impartial jury "goes to the very integrity of the legal system." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Fundamental fairness depends on factfinders who are free from any "predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Jurors are not "impartial" in the "constitutional sense of that term" if they have "strong and deep impressions" that "close the mind against the testimony that may be offered in opposition to them." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807); see also *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (A "gross

injustice" is perpetrated if a juror "entertain[s] a prejudice which would preclude his rendering a fair verdict."); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (Prejudices against "particular classes" that "sway the judgment of jurors" "deny to persons of those classes the full enjoyment of that protection which others enjoy.").

In construing the common law precursor to 606(b), the Court has held that the no-impeachment rule must be sufficiently pliable to accommodate the interests of justice. See *McDonald*, 238 U.S. at 269; see also *Clark v. United States*, 289 U.S. 1, 16 (1933); *United States v. Reid*, 53 U.S. 361, 366 (1851). This conclusion is consonant with the Court's broader jurisprudence about conflicts between fair trial rights and exclusionary rules. When evidentiary bars "insulate from discovery the violation of constitutional rights," they may "themselves violate those rights." Wright & Gold § 6074, at 513. Accordingly, the Court has also held that the rules of evidence must give way when they preclude "the meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 331 (2006); see also *Green v. Georgia*, 442 U.S. 95, 97 (1979) ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

When the Court balances competing interests to determine whether a defendant's fair trial rights should override an evidentiary exclusion, the central

question is whether "the interests served by a rule justify the limitation imposed on a defendant's constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The policy interests behind enforcement of Rule 606(b) are simply "at their weakest" in cases of jury bias involving racial prejudice. See Wright & Gold § 6074, at 513. Because racial or ethnic animus by jurors poses a particular danger to fair trial rights, the Rule 606(b) bar should not preclude consideration of juror testimony about the narrow category of statements expressly revealing such prejudice during deliberations.

## II. THE SUPREME COURT'S DECISIONS ADDRESSING THE SCOPE OF EXCEPTIONS TO 606(B) WILL NOT RESOLVE THE CONFLICT CONCERNING JUROR TESTIMONY ABOUT RACIAL OR ETHNIC BIAS.

This Court's previous decisions declining to permit juror testimony on statements during deliberations depend on alternate mechanisms for revealing sources of unfairness that will not work effectively in instances of racial or ethnic bias. The *Tanner* Court envisioned safety valves through which alleged biases could still be revealed and addressed: surface protections like external observation and the voir dire process, as well as non-juror or pre-verdict evidence of misconduct. The Colorado Supreme Court, and those courts that have adopted a similar approach, have relied on these safeguards to conclude that the *Tanner* protections are "also available to expose racial biases." *United States v. Benally*, 546

F.3d 1230, 1240 (CA10 2008), *cert. denied*, 558 U.S. 1051 (2009).

Visual observation by the judge, counsel, or court personnel, however, can do little to bring racial or ethnic bias to light. Incompetence and prejudice reveal themselves differently. For example, non-jurors are unlikely witnesses to prejudicial statements about a defendant, even though they can often testify to misconduct like intoxication. Racial prejudice also lies especially well hidden. The bias at issue in *Warger*—a juror's sympathy with a defendant who had caused a car accident—might have been established through objective evidence about her personal history, or through statements that she made outside of the jury room. But evidence outside of the jury deliberations is unlikely to reveal a juror's racially discriminatory reaction to the evidence at trial. Although there could be indications of animus such as membership in certain groups, complaints involving other racial discrimination, or past behavior towards individuals of other races or ethnicities, those external signals would not necessarily link to invidious discrimination against a criminal defendant.

The voir dire process, moreover, is even less likely to uncover racial or ethnic prejudice in jurors. Voir dire questioning might expose incentives like the *Warger* juror's potential identification with the defendant because of her daughter's experience. Nothing inhibited the *Warger* juror from freely expressing her views about liability for car accidents during voir dire. When it comes to racial or ethnic bias, a juror can hardly be expected to acknowledge that he harbors some prejudice. A juror "may have an interest in concealing his own bias" or may even be "unaware of it." See *McDonough Power Equip., Inc. v.*

*Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring); see also Neil Vidmar & Valerie P Hans, American Juries: The Verdict 91 (2007); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Public Opinion Quarterly 506, 507-09 (1998) (describing experiments on social pressure to conform to norms against prejudice). "Some jurors will intentionally deceive the courts, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant." Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 554 (1975). And "the more prejudiced or bigoted the jurors, the less they can be expected to confess forthrightly and candidly their state of mind in open court." *Id.*

Indeed, the present case provides a self-contained demonstration. During the voir dire process, prospective jurors were repeatedly asked routine questions about whether they could be "fair" and whether they had feelings "for or against" petitioner. Pet. App. 3a. No juror acknowledged any racial or ethnic bias. *Id.* Two of the seated jurors have since alleged that in the intimacy and relative familiarity of the jury room, and in the absence of authority figures and public scrutiny, a juror made repeated statements to the effect that the jury should convict the defendant "because he's Mexican." Pet. App. 4a. Overt bias was thus intertwined with the juror's view of the defendant's culpability. When a "grave" case such as this arises, the sole mechanism for addressing the bias is likely to be consideration of statements made during deliberations and brought to light by a juror after the verdict. *United States v. Villar*, 586 F.3d 76, 87 (CA1 2009).

Although courts applying Rule 606(b) to potential racial or ethnic bias point to the possibility that jurors can express concerns about deliberations prior to the verdict, that rarely occurs. See *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991). As in this case, jurors typically come forward only after a verdict is rendered. The surface protections set forth in *Tanner* thus will not suffice to protect Sixth Amendment rights because post-verdict juror testimony is likely to be "the only available evidence to establish racist juror misconduct." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988). Accordingly, when a criminal defendant proffers juror testimony pointing to a racially discriminatory verdict, courts should be permitted to consider that evidence.

## III. A NARROW EXCEPTION FOR CONSIDERATION OF JUROR TESTIMONY ABOUT DISCRIMINATORY STATEMENTS AS TO A DEFENDANT'S GUILT OR INNOCENCE IS WORKABLE AND CONSONANT WITH EXISTING EXCEPTIONS TO 606(B).

A narrow constitutional exception to consider juror testimony on racial or ethnic bias will not meaningfully increase the burden on jurors or on courts. The jurisdictions adhering to the no-impeachment rule in cases of such bias express traditional concerns with undermining finality, disrupting privacy, and inviting juror harassment. But despite admission of impeachment in many courts, there has been no "barrage of postverdict

scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. Many jurisdictions are already hospitable to juror impeachment on the question of racial or ethnic bias, and their experience suggests that the courts can readily sort and evaluate such claims when they arise. Three federal courts of appeals and seven state courts of last resort have held that no-impeachment rules should not preclude consideration of a juror's racially prejudiced statements offered to establish a violation of the constitutional right to a fair trial. See, e.g., *Kittle*, 65 A.3d at 1153 nn.9 &10. Permitting juror impeachment on these issues does not appear to have increased post-verdict juror harassment, has not opened the door to juror testimony beyond a subset of cases involving invidious discrimination directed at the defendant, and has not required courts to evaluate mental processes within the jury deliberations.

Jurors' post-trial interactions with counsel and investigators would be little altered by broader application of the constitutional exception. In states that recognize the exception, as in states that do not, juror contact rules and ethical canons already discourage parties from seeking juror statements after trial. The Colorado Code of Professional Conduct, for example, prohibits post-discharge communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). In fact, the present case arose because two jurors voluntarily expressed their misgivings about the deliberations. Rather than protecting the reporting jurors, a strict construction of the rule frustrated their efforts to expose the possibility of a tainted verdict.

Moreover, inherent limiting principles circumscribe the cases in which an exception for racist

statements would be applicable. Even the courts that have recognized a constitutional override in cases of alleged prejudice only hear testimony when the statements directly relate to the Sixth Amendment concern by implicating objective facts about the case. The Sixth Amendment issue arises when the juror's statements are linked with consideration of the defendant's guilt or innocence and "received and utilized by the jury in an evidentiary context." *Smith v. Brewster*, 444 F. Supp. 482, 490 (S.D. Iowa 1978). The scope of the constitutional exception is thus narrow. It applies only to specific racial or ethnic animus pertaining to the defendant and applied to the substance of the case. Accordingly, comments made by jurors to non-jurors, *Wright*, 559 F. Supp. at 1129, statements to non-deliberating jurors, *United States v. Shalhout*, 507 Fed. Appx. 201, 207 (CA3 2012), and offhand remarks after a verdict had already been reached, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (CA7 1987), have all been held inadmissible.

The statements in question must also be subject to corroboration. See *Perry v. Bailey*, 12 Kan. 539, 545 (1874) ("If one [juror] affirms misconduct, the remaining eleven can deny."). The California Evidence Code, for example, permits juror testimony about statements made during deliberations, but only with regard to statements that give rise to a presumption of misconduct just because they were uttered. See Cal. Evid. Code § 1150(a); *In re Stankewitz*, 40 Cal. 3d 391, 398 (1985). The California courts have rejected speculative claims or subjective impressions of prejudice. *Id.* In many jurisdictions that permit juror impeachment to address racial prejudice, courts have similarly declined to review statements of bias that do not relate to "specific readily identifiable facts or actions as opposed to

evidence of subjective mental attitudes on the part of a juror." *Laguer*, 571 N.E. 2d at 376; see also *United States v. Brassler*, 651 F.2d 600, 603 (CA8 1981); *People v. Holmes*, 372 N.E.2d 656, 659 (Ill. 1978). A constitutional exception to Rule 606(b) thus would only render testimony about racist statements admissible when that testimony can be proven or disproven. The objective verifiability of the evidence alleviates any concern with juror fraud or the possibility that a disgruntled juror could invent misconduct.

Furthermore, only overtly racist statements directed at the evidence—not stray remarks, insults exchanged between jurors, or even indications of general bigotry unrelated to the defendant—would render statements during deliberations admissible. See *Villar*, 586 F.3d at 87; *Shalhout*, 507 Fed. Appx. at 206-07. Despite the permissive approach to juror impeachment in the California rules, for example, courts there have held that the statements in question must constitute more than mere suggestions of racist thinking. See *People v. Steele*, 4 P.3d 225, 248 (Cal. 2002). Accordingly, courts have rejected testimony concerning general references to racial stereotypes during deliberations, as well as alleged statements equally applicable to gang membership or racial status. See *People v. Ali*, 2013 WL 452901, at *19 (Cal. Ct. App. Feb. 7, 2013).

These screening mechanisms are similar to the ones that courts use when confronted with allegations of external influences on jury deliberations, which are already admissible pursuant to Rule 606(b)(2). Granting review of evidence of racial or ethnic bias thus will not upset the existing balance between exposing juror misconduct and shoring up the finality and legitimacy of verdicts. As with allegations of

racially-tainted remarks, claims of external influence are subject to corroboration and refutation. The only initial question is whether the information was received or the influence occurred. Impact on the verdict is a separate inquiry

Faced, for example, with an allegation of bribery or receipt of extraneous information, a court first allows testimony to determine whether the act occurred. See, e.g., *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (CA7 1991) (proper procedure is to establish "whether the communication was made and what it contained" "without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion"). The same basic objective analysis applies when allegations arise that jurors made racially prejudiced statements. Courts need only determine "whether the communication was made and what it contained." *Id.* They make no subjective inquiry into the role that the communication played in deliberations.

Therefore, broader recognition of a constitutional exception would encompass only the objectively verifiable statements of a juror and would not require examination of the internal mental processes that Rule 606(b) was drafted to protect. See Fed. R. Evid. 606(b), Advisory Committee Note (the rule shields "mental operations and emotional reactions" during the jury's deliberative process); see also *Tobias v. Smith*, 468 F Supp. 1287, 1290 (W.D.N.Y. 1979) (allowing "objective evidence of matters improperly introduced and considered by the jury in its verdict"). Courts need not analyze the jury's actual reasoning process or engage in an ex post assessment of whether the jury was affected by the racist assertions.

This is so in evaluating a remedy for the violation as well as its existence. The issue of remedy is not before the Court, as the only question presented is whether the evidence of bias lies behind the 606(b) shield. Rule 606(b) clearly states that it "does not purport to specify the substantive grounds for setting aside verdicts for irregularity." Fed. R. Evid. 606(b), Advisory Committee Note. Under either of the approaches currently employed, however, the remedial step will not implicate the jury's reasoning process in deliberations.

Under one approach, many lower courts have concluded that the Sixth Amendment right is violated "if even one member of the jury harbors racial prejudice." *United States v. Booker*, 480 F.2d 1310, 1311 (CA7 1973). According to this view, proven racial bias on the part of a juror constitutes "a structural defect not subject to harmless error analysis." *State v. Phillips*, 927 A.2d 931, 934-36 (Conn. App. 2007); see also *State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial."). That conclusion would be consistent with this Court's holding in *Gray* that jury impartiality is "so basic to a fair trial that [its] infraction can never be treated as harmless error." 481 U.S. at 668 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

Under a second approach, whether or not to grant a new trial has generally turned on the "substantial likelihood that the alleged racial slur would have made a difference in the outcome." *Shillcutt*, 827 F.2d at 1158-59; see also *Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010). In making that determination about

remedy, courts confronting statements of racial bias have also looked to external indications like the jury's decision to acquit on some charges, *Shalhout*, 507 Fed. Appx. at 207, or overwhelming evidence of guilt that reduces concern about racial bias infecting a verdict. *Fields v. Woodford*, 309 F.3d 1095, 1006-07 (CA9 2002). Unlike the admissibility inquiry, which looks only to the objective existence of the racial or ethnic prejudice and the nature and timing of the statements in question, the remedial step accounts for extrinsic indications of the impact on the verdict.

This approach would involve the same burden-shifting framework that operates when there are allegations of extraneous prejudicial information under Rule 606(b)(2). See *United States v. Williams-Davis*, 90 F.3d 490, 497 (CADC 1996) (questioning whether there is a reasonable possibility that the outside intrusion affected the verdict). Once the defendant establishes, by a preponderance of the evidence, that the jury was exposed to racially biased statements that infected the judicial process, the burden shifts to the state to show that there was no prejudice. The judge then considers "the probable effect" of the statements "on a hypothetical average jury." *McCowen*, 939 N.E.2d at 766; see also, e.g., *Villar*, 586 F.3d at 87 (district court determined on remand that the verdict was not tainted by the racially discriminatory statements and could stand).

Petitioner would likely be entitled to a new trial in this case regardless of the remedial approach. The juror's statements were "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Marquez, J., dissenting). A juror allegedly stated, on more than one occasion during deliberations, that he believed the defendant was guilty "because he's Mexican." Pet. App. 4a. Petitioner's case was close

and dependent on a problematic identification, and the jury indicated initial deadlock on all four charges. Moreover, the case turned in important respects on the credibility of an alibi witness whose testimony the juror at the center of this appeal discredited after (erroneously) labeling the alibi witness an "illegal." Pet. App. 4a-5a; Tr. 14 (Feb. 25, 2010).

The bias expressed here is severe, focused on the defendant's ethnicity, and clearly connected with consideration of the facts of the case. The trial court in fact acknowledged that the juror testimony exposed prejudice in the deliberations, but then ruled that the bias could not support a new trial because of the no-impeachment rule. Tr. 3 (July 20, 2010).

In future cases in which a defendant likewise proffers juror impeachment involving blatant expressions of racism inserted into jury deliberations as an argument in favor of guilt, every court should have access to the relevant testimony. There is no reason to think that jurors are forfeiting meaningful protections in such a case, or that courts are incapable of screening for legitimate constitutional claims.

## IV. THE POLICIES SUPPORTING 606(B) ARE BEST SERVED BY ALLOWING JUROR TESTIMONY IN CASES OF ALLEGED RACIAL OR ETHNIC BIAS.

The Colorado Supreme Court's 4-3 decision in this case turned in large part on the policy implications of recognizing a constitutional exception to Rule 606(b). See Pet. App. 13a-15a. To be sure, the rule may give effect to concerns about intrusion into the jury room and public confidence in the finality of verdicts. Because of the nature of the statements at

issue, however, there are important institutional interests that counsel in favor of permitting inquiry into alleged statements of racial or ethnic prejudice. That inquiry could support not only the accuracy of criminal verdicts and the unbiased administration of justice, but also the integrity and legitimacy of the jury system as a whole.

Concern with "chilling" jury deliberations has no force when racist speech is at issue. In addition, jurors neither expect nor enjoy complete privacy. Rule 606(b) has always permitted non-juror testimony, as well as the use of pre-verdict statements. The rule further allows post-verdict testimony about external influences even by jurors, and it does not address juror revelations outside of court. "Juror journalism" and public discussion about jury service is not uncommon in high profile cases. The Colorado court's construction of the rule thus permits wide reporting in the public domain of racially prejudiced statements by jurors while precluding any redress in court.

Perhaps the strongest arguments favoring strict interpretation of Rule 606(b) concern the validity of jury decisionmaking itself, but those also lack force when weighed against the harm of racial or ethnic bias. It is true that jury discussions might, upon close scrutiny, fall short of ideals about the deliberative process. Jury perfection remains an "untenable goal." *Benally*, 546 F.3d at 1240. Racial prejudice is among the most dangerous of the jury's imperfections, however, and when it reveals itself openly, confronting the available evidence will do more to preserve the institution of the jury than ignoring it.

Indeed, the injury of racist factfinding is not limited to the criminal defendant deprived of a fair

trial. As this Court has recognized, prejudice causes injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Rose*, 443 U.S. at 556. A rigid interpretation of Rule 606(b) in the face of allegations of racial or ethnic bias affects not only the fundamental fairness of the trial but the appearance of fairness in the public eye. See *McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); *Batson*, 476 U.S. at 87 (stating that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" and "undermine public confidence in the fairness of our system of justice").

When a decision is based on bigotry, removing the deliberations from the court's purview does nothing to preserve the integrity of the jury. Both defendants and society may become aware of express juror prejudice through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias. Only in some jurisdictions does that assessment occur, however, and this Court should resolve the split and ensure consistent consideration of juror testimony as to racially biased statements by jurors about a criminal defendant's guilt.

If "'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination" in the criminal justice system. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting). Although this Court has recognized that the jury system might not survive

"efforts to perfect it," *Tanner*, 483 U.S. at 120, neither can it survive efforts to protect it by shielding racial prejudice from review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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